**IN THE HIGH COURT OF BOMBAY AT GOA**

**WRIT PETITION NO. 156 OF 1999.**

1. Shri Ulhas Mahabaleshwar Kholkar.

2. Smt. Bhavana Ulhas Kholkar.

3. Shri Umesh Mahableshwar Kholkar.

4. Smt. Nita Umesh Kholkar,
all majors, married, Indian
Nationals, residents of
Ribandar, Ilhas, Goa. .... Petitioners.

Versus

1. Smt. Maria Beatriz Coelho
widow of Abilio Coelho Pereira,
resident of Near Panaji Church,
Fr. Agnelo Road, Panaji, Goa,
(deceased by her Lrs.) :
(a) Mrs. Maria de Anjus Silva
e Coelho Pereira, wife of
Shri Jose Elmano Coelho Pereira,
residing near Panaji Church,
Fr. Agnelo Road, Panaji,
Goa.

2. Shri Sertorio Coelho Pereira,
major, residing near Panaji
Church, Fr. Agnelo Road,
Panaji, Goa.

3. Dr. Herlander Coelho Pereira,
major, residing in England and
through his Power of Attorney,
the respondent No.6, Jose Elmano
Coelho Pereira.

4. Smt. Maria Clelia Coelho Pereira,
residing in England and through
her Power of Attorney,
the respondent No.6, Jose Elmano

Coelho Pereira.

5. Dr. Amadio Coelho Pereira,
major, residing at Bombay
and through his Power of
Attorney, the respondent No.6,
Jose Elmano Coelho Pereira.

6. Shri Jose Elmano Coelho Pereira,
major, residing near Panaji
Church, Fr. Agnelo Road,
Panaji, Goa.

7. Miss Celia Coelho Pereira,
major, residing near
Panaji Church, Fr. Agnelo
Road, Panaji, Goa.

8. President,
Administrative Tribunal, Goa,
Coelho Pereira Building,
Opp. Masjid, Panaji, Goa.

9. Addl. Rent Controller,
Sub-Division, Panaji,
Office of the Collectorate,
Panaji, Goa. ..... Respondents.

Shri S.G. Dessai, Senior Advocate with Shri P. A. Kholkar, Advocate for the Petitioners.

Shri M.S. Usgaonkar, Senior Advocate with Shri Sudesh Usgaonkar, Advocate for the Respondents.

**CORAM: J. N. PATEL, J.**

**DATE: 30th NOVEMBER, 2006.**

**J U D G M E N T:**

The petitioners/tenants who are the legal heirs of the original tenant Mahableshwar Ramchandra Colcar have challenged the Judgment and Order

dated 24th December, 1998 passed by the President of the Administrative Tribunal at Goa whereby he confirmed the order passed by the Addl. Rent Controller on 16th January, 1995 in which an order of eviction came to be passed against the tenant on the application made by the original landlord Abilio Coelho Pereira. The respondents No.1 to 7 are the legal heirs of the original landlord. For the sake of brevity and convenience they are being referred as landlord and tenant respectively for the purpose of disposing of this petition.

2. In a nutshell, the facts which are not in dispute can be summed up as under :-

The original landlord leased the premises to the original tenant on 10.1.1959 on the ground floor of the building situated at Panaji on a monthly rent of Rs.75/-. After some years, another shop was leased in exchange to the original premises for the same amount and in the same building on the ground floor. Subsequently rent was enhanced to Rs.80/- p.m. and then Rs.100/- p.m.. On 18.8.1977 the original tenant entered into a partnership under the name and style of M/s. Mandovi Tours & Travels for the purpose of conducting business in the said premises, himself as partner and one of his sons and daughter-in-law as the other two partners and a family friend one Mrs. Kunda Jagdish Wagh who retired from the partnership from 6th November, 1983. It is also not disputed that the original tenant was earlier doing the business of grocery in the suit premises and thereafter started the business of Tours & Travels by forming the aforesaid

partnership. Taking exception to this, the original landlord filed an application in the Court of Rent Controller, North Division, Goa for seeking eviction of the original tenant on the ground that the petitioner/tenant transferred/sub-let to M/s Mandovi Tours & Travels a partnership concern the tenancy interest in the premises let out to the petitioner and the said transfer/sub-letting has been done without the permission or consent of the respondent and that the said transfer/sub-lease is exclusively running the business in the rented premises and that the petitioner is not having the grocery shop in the said room and this is sufficient ground for eviction and therefore the petitioners be evicted from the said room.

3. In reply to the claim for eviction on the ground of sub-letting the, the petitioner/tenant denied that he has transferred/sub-let the premises to M's. Mandovi Tours & Travels a partnership concern and that the same has been done without permission and consent of the respondent as alleged.

4. On the other hand the petitioner took the plea that it is neither a transfer or sub-letting and therefore permission or consent of the respondent, does not arise, though change in the nature of business and constitution of partnership firm was duly informed to the landlord who gave his consent.

5. The case put up by the tenant was that as he was not doing good in the grocery business and he had advanced in age, he thought of starting the business

of Tours & Travels within the territory of Goa and for this reason and with a view to carry on such business, he formed a partnership in the name and style of M/s. Mandovi Tours & Travels and took his son and daughter-in-law as his partners and one Mrs. Kunda Wagh. It is also stated that the booking and reservation of passengers of M/s. Mandovi Tours & Travels is being done at the said premises and except for the tenant/opponent no other partner do anything in relation to the said business of the firm in the suit premises and therefore the suit premises are neither sub-let to the said M/s. Mandovi Tours & travels nor the interest in the premises or tenancy has been transferred to the said firm. It has been specifically pleaded that the possession of the suit room of the premises is exclusively under his control and booking and reservation of the said firm M/s. Mandovi Tours & Travels does not amount to transfer of interest or sub-letting and claimed that he has obtained the consent from the respondent/landlord for the same and on the occasion of inauguration of the premises, the landlord even sent his son and daughter to grace the occasion and therefore he submitted that there is no change of user of the premises and in any event, the tenant having obtained permission and consent of the landlord and having not sub-let the premises, no case for eviction is made out and therefore the petition deserves to be dismissed.

6. The petitioner/tenant had also filed an additional written statement in order to place on record as to how and in what circumstances he was inducted in the premises as a tenant and without there being a written contract between the parties in respect of the suit premises, took up a plea in his defence that there was

no stipulation of any kind that the suit premises can be used only for grocery shop. The agreement dated 10.01.1959 never related to the suit premises.

7. On the basis of these pleadings, parties led their respective evidence before the Rent Controller. On behalf of the landlord, his son was examined as a witness along with two others in support of his claim for eviction and on behalf of the tenant, one of the sons of the petitioner/tenant Ulhas Mahableshwar Kholkar examined himself and two other witnesses.

8. The Addl. Rent Controller, Panaji Sub-Division, Panaji, Goa, by the impugned Judgment and Order arrived at a finding that the tenant has failed to establish that he is actually conducting the business in the premises in the name and style of M/s. Mandovi Tours & Travels. Having failed to examine any evidence to that effect, held that it is difficult to accept that this partnership actually existed. But it was a cover-front for any underhand dealings with Balaji Lawande and Netravalkar who have not come before the Rent Controller to depose as witnesses and therefore the landlord has proved that the tenant has sub-let the premises. The Rent Controller also took cognizance of the subsequent events as during the pendency of the proceedings it appears that the original tenant had expired and his legal heirs became tenants of the premises who were prosecuting the proceedings and found that the onus was on the tenant to prove that there had not been any underhand sub-letting as sub-letting being clandestine affair and direct evidence cannot ordinarily be available by placing reliance in the

case of ***Trilok Singh and another v. M/s. Bhawani Prasad Girdharilal (1993 (1) RCJ 292)*** ` and therefore direct evidence cannot be brought by the respondent/landlord and proceeded to pass the impugned order directing the tenant to vacate the suit premises and to put the landlord in possession within thirty days from the date of receipt of the order.

9. The matter was taken in appeal before the Administrative Tribunal, Goa which came to be registered as Eviction Appeal No. 4/95 by the L.Rs. of the original tenant. It appears that by that time the original landlord also passed away and therefore his LRs were joined as respondents. By Judgment and Order dated 24.12.1998 the appellate authority concurred with the finding of the Rent Controller and dismissed the appeal.

10. Mr. S.G. Dessai, the learned Senior Advocate appearing for the petitioners/tenants submitted that the Rent Control Authority proceeded on a misconception that the burden lies on the tenant to prove that he has not sub-let the premises and in absence of any evidence being led by the tenant on behalf of the firm by examining any of its partners, it can be safely concluded that it was a clandestine arrangement made between the original tenant to have a deed of partnership as a camouflage for sub-letting the premises to third parties namely one Balaji Lawande and Netravalkar. It is contended that it is well settled that if there was a partnership firm of which the tenant, his family members were holding major share and the business of the firm was carried on by the partners,

the effect of carrying on the business of partnership in the premises would not amount to sub-letting, leading to forfeiture of the tenancy and in support of his contention has placed reliance on the case of ***Helper Girdharbhai v. Saiyed Mohmad Mirasheb Kadri and others (A.I.R. 1987 S.C. 1782)*** and submitted that similar view has been taken relying on the said Judgment by the learned Single Judge of this Court in the case of ***Shantilal Manilal Shah v. State of Maharashtra and others (A.I.R. 1995 Bombay 388)*** wherein this Court held that when a person after taking premises on rent, entered into partnership and allowed the partnership firm to carry their business in his rented premises, it did not amount to sub-letting, because the tenant continues to remain in possession of the rented premises and it cannot be said that the tenant has parted with possession of the rented premises to the partnership firm.

11. Mr. Dessai submitted that it was the landlord's case before the Rent Controller that the tenant has transferred/sub-let to M/s. Mandovi Tours & Travels a partnership concern the tenancy, and the premises let out to the tenant which has been done without permission or consent of the landlord and this was the pleading on the basis of which the eviction order was sought and the landlord himself relied upon the deed of partnership and this fact was not disputed by the tenant and is also the case of the landlord whose son Jose Coelho Pereira who was examined as a witness deposed to the same effect as pleaded in the application filed before the Rent Controller. The Rent Controller erred in law and fact in coming to the conclusion that the premises were actually sub-let to Balaji

Lawande and one Netravalkar who were conducting the business in the name of M/s Mandovi Tours & Travels which is the evidence of the witnesses examined by the landlord in support of his case and is contrary to the pleadings.

12. It is further contended that apart from deviating from his pleadings there has been no evidence brought on record to show that the landlord has factually sub-let the premises to a third party and therefore in absence of the landlord having failed to discharge the initial burden that the tenant has sub-let the premises, the question of onus shifting on the tenant does not arise and therefore the whole approach of the Rent Controller as well as the appellate authority in appreciating the evidence and coming to the conclusion that the landlord has been able to prove that the tenant has sub-let the premises and deserves an order of eviction is erroneous and deserves to be quashed and set aside.

13. Mr. Usgaoncar, learned Senior Advocate appearing for the respondent/landlord, submitted that it is common practice that the tenants sub-let the premises without the permission of the landlord and in order to defeat the provisions of law normally create documents like deed of partnership, as an intricate method for creation of sub-tenancy or for providing a clue or cover for clandestine proceeding not provided in law and therefore the landlord in the present case in the evidence of his witnesses has brought on record the fact that in the premises which were let out to the tenant, the tenant nor members of his family are seen conducting the business, but the same is being conducted by one

Balaji Lawande and Netravalkar. The onus rightly shifted on the tenant to prove that it is not so. Further Mr. Usgaonkar, learned Senior Advocate submitted that the tenant failed to examine any witness who is concerned with the business of partnership firm M/s Mandovi Tours & Travels. The tenant has examined his son on his behalf i.e. Ulhas Kholkar who is not in a position to state anything about the business of the firm and admitted that the firm is not maintaining any books of account so as to reflect what profit and loss they are making and this witness is working in the Syndicate Bank which itself shows that the tenant has suppressed the fact of doing business in the premises in partnership under the name and style of "M/s. Mandovi Tours & Travels". It is pointed out that this witness was specifically asked as to who will be using the premises if the partnership is dissolved which he was not able to answer and therefore considering his evidence on record, it can be safely inferred that the premises has been sub-let to Mr. Balaji Lawande and Netravalkar who have been found in the premises and in the absence of any evidence being brought on record by the tenant in order to show that he has not sub-let the premises, the Rent Control authority was justified in passing the impugned order which does not call for any interference.

14. Mr. Usgaonkar, the learned Senior Advocate placed reliance on the decision rendered in the case of ***Parvinder Singh v. Renu Gautam and others (2004) 4 S.C.C. 794*** in which the Supreme Court has dealt with the question of sub-letting and has particularly observed in paragraph 8 of the reported Judgment, the modus operandi adopted by tenants in such cases and therefore

the petition deserves to be dismissed.

15. Having heard the learned counsel for the parties and gone through the record and proceedings of the Rent Control authorities this Court finds that the landlord had approached the Rent Controller with a specific case that the premises have been sub-let by the tenant to the firm M/s. Mandovi Tours & Travels and both the authorities have accepted this fact as it was not disputed by the tenant. But the tenant claimed that except for one of the partners all others were his family members and due to passage of time the other partner has retired and therefore they have never parted with possession of the suit premises. Insofar as the burden of proof is concerned, the primary burden of proving its case would definitely be on the landlord who is claiming the relief of eviction of the tenant on the ground of sub-letting under clause 22(2)(b)(i) of the Rent Control Act. It is thereafter that the onus may shift on the tenant. Once it is accepted that in the premises taken on rent by the tenant, if subsequently he enters into a partnership and if the tenant is associated actually with the partnership business and is in control along with the partners, the tenant may not have been said to have parted with possession in favour of the third party, the application of the landlord to seek eviction of the tenant must fail. In the present case the very foundation on which the landlord sought eviction of the tenant is that the premises has been sub-let to the partnership firm M/s Mandovi Tours & Travels of which admittedly the original tenant and two of his family members hold major share and the fourth partner Mrs. Kunda Wagh has retired from the partnership which has been

brought on record by tendering deed of retirement (Exh.P3). Therefore it cannot be said that the partnership firm M/s Mandovi Tours & Travels is sham and bogus merely because the witness examined by the tenant is not in a position to state about the affairs of the business of the firm being not concerned with it. It is a matter of record that when the tenant wanted to examine one of the partners Umesh Kholkar, who is the son of the original tenant, the Rent Control authority did not permit him.

16. The findings of the Rent Controller as well as of the appellate authority is based on the evidence of the two witnesses who have been examined by the landlord who are neighbouring shop-keepers and their evidence only goes to show the presence of Balaji Lawande and Netravalkar in the premises. But in their cross-examination these two witnesses except for seeing them in the premises, they stated that they had no further knowledge as to whether they were conducting the business in the premises or not.

17. It is well settled law that decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that is to be proved. In the present case the landlord has not pleaded that the business of the firm M/s. Mandovi Tours & Travels is not conducted by its partners, but by Balaji Lawande and Netravalkar and therefore the tenant has parted with the premises by sub-letting the same to these two persons under the garb of a deed of partnership by constituting a bogus firm of Mandovi Tours & Travels. At the cost of repetition it

is to be stated that the pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings in propounding a new case which is exactly what has happened in the present case. Even if it is accepted that the ground on which the landlord wanted an order of eviction for sub-letting, then nothing prevented the landlord from relying on specific pleading relating to the manner in which it is sub-let and to the parties who are put in possession by the tenant as sub-tenant. Even the son of the landlord who examined himself as witness in support of the case of the landlord, does not even whisper about the fact that the premises had been sub-let to Balaji Lawande and Netravalkar and therefore in absence of any pleading to that effect and cogent, consistent and reliable evidence in support, the Rent Control Authority erred in holding that the tenant has not rebutted the case of the landlord by disowning that the premises were sub-let to Balaji Lawande and Netravalkar, and having failed to discharge their burden, have proved their case that the tenant has sub-let the premises. Though it was not the case of the landlord before them and in absence of such pleading, the Rent Control Authority could not have taken into consideration the evidence of the two witnesses examined on behalf of the landlord on this issue as such a case was not required to be met by the tenant in reply to the claim of the landlord to seek eviction on the ground of sub-letting the premises to Mandovi Tours & Travels, a partnership firm of which obviously the tenant and his family members were the major partners. Mere presence of certain persons in the premises, by itself, cannot lead to the conclusion that the premises were sub-let to them unless the said fact was

pleaded and there is substantive evidence led to establish the fact of sub-letting the premises by the tenant to a third party.

18. Therefore, this Court finds that the Judgment and Order of eviction passed by the Rent Controller on the ground of sub-letting the premises and upheld by the appellate authority cannot sustain in the eyes of law, and the petition deserves to be allowed.

19. The impugned Judgment and Order is therefore quashed and set aside. Rule is made absolute in the aforesaid terms with no order as to costs.

**J. N. PATEL, J.**

**sl.**